

Date: Wed Sep 14 15:38:33 EDT 2016
From: Leavy.Jacqueline@epamail.epa.gov
To: CMS.OEX@epamail.epa.gov
Subject: FW: Dakota Access Pipe Line

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From: John Fowler [mailto:jfowler@achp.gov]
Sent: Wednesday, September 14, 2016 3:36 PM
To: councilmembers <councilmembers@achp.gov>
Subject: Dakota Access Pipe Line

Many of you have undoubtedly heard about the proposed Dakota Access Pipe Line (DAPL), an 1100-mile oil pipeline from North Dakota to Illinois. The primary federal agency involved is the Army Corps of Engineers, which is issuing permits for a number of waterway crossings, and the primary tribe involved is the Standing Rock Sioux. The issues are complex, major tribal protests have been mounted, and a lawsuit in federal court led to an opinion last Friday.

The ACHP has been significantly involved in the Section 106 review process. We are currently preparing a background paper for members to understand the issues, the ACHP's role, and the current state of the case. In the meantime, I wanted to provide some basic information.

DAPL is a privately-funded project being constructed primarily on private lands. The most significant federal "hook" is the Corps permits for waterway crossings. There are nuanced issues about nationwide permits and Appendix C (the Corps' Section 106 procedures) that will be dealt with in our backgrounder. For today, suffice it to say that the ACHP and the Corps disagreed on the adequacy of the Corps compliance with Section 106, due primarily to the Corps' approach that looked only at the individual crossings and not the overall effects of the pipeline in its entirety.

We formally objected to the Corps' Section 106 findings per the regulations. The Corps disagreed with our objections and proceeded to complete the 106 process, as the 106 regulations permit. Those actions-our objections and the Corps' response-completed our formal role in the Section 106 process.

Subsequently the Corps was sued on the basis of failure to meet its obligations under Section 106. Plaintiffs alleged the failure of the Corps to consider the pipeline as a whole and assess its impact on historic properties violated 106 and that the Corps failed to properly consult with Indian tribes.

On Friday, the U.S. District Court for DC denied plaintiffs' request for a preliminary injunction. The court cited a NEPA decision from 2015 that limited the Corps' responsibility for considering the environmental impacts in its permit decisions and applied this narrower rule to the Corps' 106 obligations in the current case. Given the limited scope of Corps' review, the court found that the Corps had met its tribal consultation responsibilities for the project and held that the plaintiffs had not met the standard for obtaining a preliminary injunction. The decision is being appealed.

In the immediate wake of the decision, Interior, Justice and the Army issued a joint statement doing two things. First, it said the Army would withhold Issuance of the permit for the pipeline crossing of the Missouri River at Lake Oahe, which is the principal area of concern to the Standing Rock tribe, and would conduct further consultation with tribes on that specific issue. Second, it said the following on the broader issue of infrastructure permitting, sacred site protection, and tribal consultation:

“Furthermore, this case has highlighted the need for a serious discussion on whether there should be nationwide reform with respect to considering tribes’ views on these types of infrastructure projects. Therefore, this fall, we will invite tribes to formal, government-to-government consultations on two questions: (1) within the existing statutory framework, what should the federal government do to better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights; and (2) should new legislation be proposed to Congress to alter that statutory framework and promote those goals.”

We have reached out to various parties within the Administration to stress the importance of ACHP involvement in these subsequent consultations. We also have expressed to Justice our strong desire to participate in the development of further positions in the litigation (they did not involve us in the District Court proceedings, despite our requests).

That is the status as of today. You will be hearing about the case in the media, as protests have continued on site and elsewhere. If you have any questions, please feel free to ask us. Please also note that this case is continuing to be litigated and that our statements must be considered in that context.

We will get you the more detailed background statement as soon as we can and it will include key correspondence that conveys the ACHP's official position on the 106 issues.

John

Sent from my iPad